Supreme Court, U.S.
FILED

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Case No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JESSE A. EDWARDS,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FOR WRIT PETITION OF CERTIORARI

JESSE A. EDWARDS, Pro Se
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7 S P

QUESTIONS PRESENTED

Should interest be paid on backpay awarded to a Federal Government employee by the United States District Court of Colorado?

PARTIES TO THE PROCEEDING

Petitioner:

Jesse A. Edwards, Pro Se
14378 West Bayaud Ave.
Golden, Colorado

Defendant:

Bruce Babbitt, Secretary
of Interior United States
Department of Interior
and Minerals Management Service

Represented by:

Solicitor General Department
of Justice
Tenth & Constitution Ave. N. W.,
Washington, D. C. 20530

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OFFICIAL OPINIONS DELIVERED

In one of the first cases giving retroactive effect to the Civil Rights Act of 1991, the U.S. District Court for the District of Columbia ruled that interest on attorneys' fees is available in discrimination suits against the federal government (Brown v. Marsh, DC DC, No. 80-1169 (CRR),11/21/94.) It appears in the Appendix at pages 9-18.

OPINION BELOW

On November 23, 1994, the Tenth Circuit, U.S. Court of Appeals affirmed the decision of the district court denying the petitioner's request for payment of interest of backpay awarded by the court. It appears at Appendix pages 1-8.

STATEMENT OF JURISDICTION

When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

No person shall . . . be deprived of life, liberty, or Property, without due process of law.

STATEMENT OF THE CASE

The District court agreed with the EEOC Examiner and found that Edwards was discriminated against on basis of race under Title VII of the Civil Rights Act of 1964. The court ordered that Edwards be promoted retroactively, including back pay and other benefits. The court did not award prejudgment interest. Edwards appealed, contending that he was entitled to prejudgment interest on the back pay award.

BASIS OF FEDERAL JURISDICTION IN THE FIRST INSTANCE

This is a Title VII case involving an employee of the Federal Government.

REASONS FOR GRANTING THE WRIT

The U. S. District Court for the District of Columbia ruled on 11/21/94, that interest on attorney's fees is available in discrimination suits against the federal government. This conflicts with the decision of the Tenth Circuit, U.S. Appeals Court on which this review is being requested. Although the basis of this District of Columbia case is the payment of interest on attorney fees, I would suggest that if the Governments does not have immunity against paying interest on attorney fees, then, it does not have immunity against paying interest on back pay, which is issue herein.

APPENDIX

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JESSE A. EDWARDS, on behalf of himself and all others similarly situated,

Plaintiff-Appellant-Cross-Appellee,

v.

BRUCE BABBIT, UNITED STATES DEPARTMENT OF THE INTERIOR, Minerals Management Service,

Defendants-Appellees-Cross-Appellants

Appeal from the United States District Court for the District of Colorado
(D.C. No. 85-C-2444)
(738 F.Supp. 426)

Jesse A. Edwards. Pro se.

Stuart M. Gerson, Assistant Attorney General, Michael J. Norton, United States Attorney for the State of Colorado, Marleigh D. Dover, Jonathan R. Siegel, Department of Justice, Washington, D.C.

Before ANDERSON, REAVLEY[1] and HENRY, Circuit Judges.

REAVLEY, Circuit Judge.

Jesse A. Edwards ("Edwards") brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, and the age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623 (a) and (d) against the United States Department of Interior, Minerals Management Service ("MMS"). The district court found that Edwards had been unlawfully discriminated against in violation of Title VII and ordered that Edwards be retroactively promoted. The government does not appeal this order. After a subsequent hearing on remedies, the district court awarded back pay with post-judgement interest, attorney's fees with interest, and other equitable relief, but denied prejudgment interest. Both parties appeal the subsequent remedial order. We modify the judgment to eliminate the award of interest.[2]

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[1] The Honorable Thomas M. Reavley, United States Court of Appeals, Fifth Circuit, sitting by designation.

[2] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. This case is therefore ordered submitted

BACKGROUND

Edwards has worked for the Minerals Management Service, previously the Royalty Management Program, since 1976. Since 1979, he has been employed at the GS-12 level. in 1981, 1982, and 1983, Edwards applied for numerous positions which would have constituted promotions. He was rejected and filed complaints of discrimination. An EEOC Complaints Examiner concluded that Edwards had been a victim of discrimination and recommended that he be promoted to a GS-13 position retroactive to June 1981 and to a GS-14 position retroactive to June 1982. In response, on November 27, 1985, MMS promoted Edwards to a GS-13 position, retroactive to June 13, 1982. Edwards brought suit in Federal District Court.

The district court agreed with the Examiner and found that Edwards was discriminated against on the basis of race under Title VII of the Civil Rights Act of 1964. The court ordered that Edwards be promoted to GS-13, effective June 1981, and GS-14, effective June 1982, including back pay and other benefits. Subsequent to the initial order, during a hearing on remedies in the case, Edwards asked the court to reopen a vacancy announcement for a GS-15 position, arguing that the government's delay in abiding by the court's order to promote him to GS-14

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without oral argument.

prevented his application for two GS-15 positions. The court refused to re-open the announcement. The court's subsequent remedial order also denied an award of prejudgment interest, but allowed an award of post-judgment interest and interest on attorneys fees.

Edwards appeals contending that the vacancy announcement for the GS-15 position should have been reopened and that he was entitled to prejudgment interest on the back pay award. The government Appeals the award of post-judgment interest and interest on attorneys fees. We agree with the government in all respects.

DISCUSSION

A. The Government's Immunity from Interest Awards

The Supreme Court has held that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." Library of Congress v. Shaw, 478 U.S. 310, 314, 106 S.Ct. 2957, 2961, (1986). In Shaw, the Court went on to hold that Title VII did not contain a waiver of immunity from an interest award based on attorney's fees. id. at 323.[3] As

[3] The Civil Rights Act of 1991 amended Title VII to allow for interest on awards against the government. Pub. L. No. 102-166, tit. I, §114, 105 Stat. 1079 (codified at 42 U.S.C. §2000e-16(d)

Shaw is applicable to this case, we vacate the district court's award of interest on its attorney's fees award.

The "no-interest" rule, affirmed in Shaw, states that the United States Government is immune from awards of interest in general and not only interest on attorney fee awards. Id. at 314. The Supreme Court has held that although Title VII did not provide the requisite waiver of immunity for interest on attorney's fees in *Shaw*, the requisite waiver may be supplied under certain circumstances by another statute. Loeffler v. Frank, 486 U.S. 549, 565, 108 S.Ct. 1965, 1974-75 (1988). Edwards sought an exception to the "no-Interest" rule by relying on the Back Pay Act (the "Act") to argue that he was entitled to prejudgment interest on his award of back pay. The district court refused to award prejudgment interest, adopting the interpretation of the Back

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(1991)). The Supreme Court has held, however, that several provisions of the Civil Rights Act are not to be retroactively applied. Landgraf v. USI Film Products, 114 S.Ct. 1483, 1508 (1994); Rivers v. Roadway Exp., *Inc.*, 114 S.Ct. 1510, 1519-20 (1994). Although these decision did not deal with the section of the Civil Rights Act related to interest, §114, the rationale for supporting the presumption against retroactive application to the sections at issue is those cases also supports a presumption against retroactive application of §114.

Pay Act given by the D.C. Circuit in Brown v. Secretary of the Army, 918 F.2d 214, 216 (D.C. Cir. 1990). We agree and also adopt Brown's interpretation of the Back Pay Act.

Brown held that "the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards. . . ." Id. at 218. Therefore, prejudgment interest is available if a case falls within the coverage of the Back Pay Act. That Act, however, expressly limits its coverage to back pay awards stemming from the unlawful "withdrawal or reduction" of compensation. 5 U.S.C. §5596(b)(1) (1980). This language excludes failure to increase someone's compensation, which is the case in a promotion denial. In 1978, congress amended the Back Pay Act to include "the Omission or failure to take an action or confer a benefit" within the scope of personnel actions covered by the Act. Pub. L. No. 95-454, §702, 92 Stat. 1111, 1216 (1978) (codified at 5 U.S.C. §5596(b)(3)(1980)). This language indicates that promotions may be included in the coverage of the Back Pay Act. Congress did not change, however, the language indicating that it covered only back pay awards stemming from the unlawful "withdrawal or reduction" of compensation.

The court in Brown reconciled the language by holding that the Back Pay Act covers illegal refusals to make mandatory promotions, but does not cover discretionary or noncompetitive promotions. If a promotion is mandatory

or nondiscretionary, and increase in compensation is automatic and a failure to provide for that increase is a reduction in compensation. This interpretation is consistent with congressional intent evidenced in the legislative history of the 1978 amendment. As the D.C. Circuit noted, a senate Report on the amendment stated that the reference to personnel action that is "unjustified or unwarranted" in the amended Back Pay Act means "'acts of commission as well as omission with respect to nondiscretionary provision of law, Executive order, regulation, or collective bargaining agreement.'" Brown, 918 F.2d at 220 n.4 (quoting S.Rep. No. 969, at 115 (emphasis added)).

We adopt this interpretation of the Back Pay Act. The promotions at issue in this case were competitive and discretionary. Therefore, this case is not covered by the Back Pay Act. As there is no other basis for a waiver of immunity with respect to prejudgment interest, we affirm the district court's denial of prejudgment interest.

The district court did not indicate what statute it found congressional consent to an award of post-judgment interest. We know of no authority for a waiver of immunity to post-judgment interest in this case and therefore vacate the district court's award of post-judgment interest.

B. Re-opening of Vacancy Announcement

Because Edwards was not retroactively promoted to GS-14 until December 30, 1990, he was unable to apply for two GS-15

positions offered in a vacancy announcement at MMS. Edwards seeks a reopening of this announcement so that he can apply. The district court found that there was no evidence suggesting that had Edwards been promoted earlier, he would have secured either position offered. The district court concluded that Edwards' experience would have made him a weak candidate for the position in question. The district court made the factual determinations that a criteria for the positions in question was supervision of auditors and Edwards had done no formal audit work since 1981 and had little experience supervising auditors. Edwards does not challenge these findings. "A court . . . cannot under Title VII properly order the promotion of an employee to a position for which he or she is not qualified." Locke v. Kansas City Power & Light Co., 660 F.2d 359, 368 (8th Cir. 1981) (citations omitted). The district court did not abuse its discretion in refusing to re-open the vacancy announcement.

CONCLUSION

We modify the district court's judgment to vacate the award of post-judgment interest and interest on the attorney's fees and award and affirm the judgment in all other respects.

AFFIRMED AS MODIFIED.

UNITED STATES DISTRICT COURT FOR DISTRICT OF COLUMBIA

JAMES E. BROWN Plaintiff V. JOHN O. MARSH, Jr. Secretary of the Army Defendant	)	Nos. 80-1169 (CRR)

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

INTRODUCTION

In 1991, Congress amended the Civil Rights Act of 1964 ("The 1964 Act"), as amended in March, 1972. 42 U.S.C. s 2000a et seq. The Civil Rights Act of 1991 ("The 1991 Act") provides in Section 114 that: The provisions of section 2000e-5 (f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

42 U.S.C. s 2000e-16(d) ("Section 114") (emphasis added). Section 114 entitles a prevailing party in a Title VII action to an award of interest on previously awarded attorney's fees and expenses.

The question presented in this case is whether the above statute, which provides for interest on attorney's fees and expenses, applies to a case that was pending at the time the statute was enacted.

Upon careful consideration of the pleadings, oral argument, and the applicable law, the Court holds that Section 114 applies to the case at bar, entitling the Plaintiff to interest on

his attorney's fees and expenses. In addition, the Court holds that interest shall be calculated in accordance with the judgment rate of interest prescribed in 28 U.S.C. s 1961.

FACTS

On August 20, 1992, the Court awarded attorney's fees and expenses to the Plaintiff as a prevailing party in a Title VII action. However, the Court reserved the issue of whether interest on those fees is awardable pending resolution by the District of Columbia Circuit of the applicability of the Civil Rights Act of 1991 to pending cases.

In late 1994, the Plaintiff filed an application for interest on his attorney's fees in light of this Circuit's decision in Gersman v. Group Health Ass'n Inc., 975 F.2d 886, 898 (D.C.Cir.1992), cert. denied,--- U.S. ----, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994), and the Supreme Court's decision in Landgraf v. USI Film Prods., --- U.S. ---,--- - ---, 114 S.Ct. 1483, 1501-02, 128 L.Ed.2d 229 (1994).

In response, the Government agreed to pay the plaintiff interest on his attorney's fees and expenses incurred after the enactment of Section 114 of the Civil Rights Act of 1991. However, the Government contended that the Plaintiff is not entitled to any interest on fees prior to the enactment of Section 114. According to the Government, there is a presumption against the retroactive application of a statute whenever applying the statute would affect the parties'

substantive rights. See e.g., Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S.Ct. 468, 471-72, 102 L.Ed.2d 493 (1988). The Government contends that the presumption against retroactivity applies in this because awarding interest on attorney's fees is a compensatory damage award and, therefore, would affect their substantive rights. Nevertheless, even if the Plaintiff were entitled to interest, the Government argues, the appropriate rate of interest is the judgment rate of interest prescribed in 28 U.S.C. s 1961.

The Plaintiff, in response, contends that the presumption against retroactive application of a statute does not arise when the application is merely collateral. In such cases, a court must apply the law that exist at the time that it renders its decision. See e.g., Bradley v. Richmond School Bd., 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). According to the Plaintiff, awarding interest on attorney's fees in a case that was pending when Section 114 was enacted is purely collateral and, therefore, does not affect the substantive rights of the parties. Consequently, the Plaintiff argues that he entitled to interest on his attorney's fees and that the appropriate rate of interest is the prime rate.

Upon review of the pleadings, oral argument, and applicable law, the Court finds that the Section 114 of the Act allowing for interest on attorney's fees does not affect the parties' substantive rights. Therefore, the presumption against retroactive application of a

statute does not apply. Instead, the Court must apply the law that exists at the time it renders its decision. Since Section 114 is currently effective, the Court finds that the Plaintiff is entitled to an award of interest on his attorney's fees and costs. In addition, in view of the substantial case law applying the judgment rate of interest instead of the prime rate of interest to an award of attorney's fees, the appropriate rate of interest is the judgment rate set forth in 28 U.S.C. s 1961.

DISCUSSION

I. THE COURT FINDS THAT THE PLAINTIFF IS ENTITLED TO INTEREST ON HIS ATTORNEY'S FEES AND COSTS BECAUSE APPLYING SECTION 114 RETROACTIVELY ONLY AFFECT THE COLLATERAL RIGHTS OF THE PARTIES.

[1] Section 114 of the Civil Rights Act of 1991 entitles a prevailing party to interest on attorney's fees from a Government party. 42 U.S.C. s 2000e-16 (d) ("Section 114"). At the time that Section 114 took effect in November of 1991, the instant action was still pending before this Court.

[2] To decide if Section 114 applies retroactively, the Court must first look to the language of the statute itself. E.g., Planned Parenthood Fed'n of Am. v. Heckler, 712 F.2d 650, 655 (D.C.Cir.1983) (citing CPS v. GTE Sylvania, Inc., 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)). However, since the statue is silent with respect to whether Section 114 applies retroactively or not, the Court

must look to the relevant case law.

[3] According to case law, if applying a statute retroactively would affect the parties' substantive rights, then a presumption against retroactive application of a statute arises. Landgraf v. USI Film Prods., --- U.S. ----,----,----, 114 S.Ct. 1483, 1499, 1502, 128 L.Ed.2d 229 (1994); Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S.Ct. 468,471-72, 102 L.Ed.2d 493 (1988); Gersman V. Group Health Ass'n, Inc., 975 F.2d 886, 898 (D.C.Cir.1992) cert. denied, --- U.S. ----, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994). Based on that presumption, a statue will not be applied retroactively.

[4] In contrast, if applying a statute retroactively would only affect the parties' collateral rights, then a court is to apply the law that exist at the time it enters its decisions. Landgraf v. USI Film Prods., --- U.S. --- - ---, 114 S. Ct. 1483, 1501-02, 128 L.Ed.2d 229 (1994); see L.Ed.2d 476 (1994); Thrope v. Housing Auth. of Durham, 393 U.S. 268, 281, 89 S.Ct. 518, 525-26, 21 L.Ed.2d 474 (1969); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801); Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 898-99 (D.C.Cir.1992), cert. denied, --- U.S.----, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1964). Accordingly, a statute that does not affect the substantive rights of the parties will be applied retroactively.

In applying the foregoing analysis to the case at bar, the Court must decide if awarding the Plaintiff interest on his

attorney's fees affects the parties' substantive rights. For if the award of interest on attorney's fees affects a substantive right, the traditional presumption against retroactive application of a statute applies. Conversely, if the award of interest on attorney's fees is a collateral or secondary matter, the Court is to apply the law that exists at the time it renders its decision. Upon examining the nature of an award of interest on attorney's fee's, the Court holds that interest on attorney's fees are merely collateral or secondary, and therefore, are awardable in this case for three reasons.

First, prior to the enactment of Section 114, plaintiffs in a Title VII action were entitled to interest on attorney's fees in private-sector cases. See, 42 U.S.C. s 2000e-5(k) (1982); e.g., Rodgers v. United States, 332 U.S. 371, 373-74, 68 S.Ct. 5, 6-7, 92 L.Ed. 3 (1947); Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 764, & n. 6 (7th Cir.1982), cert. denied, 461 U.S. 956, 103 S.Ct 2428, 77 L.Ed.2d 1315 (1983) The enactment of Section 114 merely extends an award of interest to cases involving the Government. Consequently, as a mere "extension" of prior law, Section 114 does not substantively change the parties' rights.

Second, the Supreme Court has held that since awarding attorney's fees is uniquely separable from the cause of action to be proved at trail, awarding such fees is a collateral issue. White v. New Hampshire Dept. of Employment

Security, 455, 451-52, 102 S.Ct. 1162, 1166-67, 71 L.Ed.2d 325 (1982). It follows from White that a statute, such as Section 114, that awards interests on those fees must also be a collateral issue.

Third, the Government can not contend that their substantive rights will be affected because prior to the enactment of Section 114, parties were already entitled to attorney's fees in the private-sector cases. Section 114 merely added that interest on those fees shall also be payable in public-sector cases. Thus, Section 114 does not add a substantive obligation on part of the Government. Moreover, Section 114 of the 1991 Act waives sovereign immunity with respect to interest.

Based on the foregoing, since an award of interest on attorney's fees is a collateral issue, Section 114 shall apply to this case and, therefore, the Plaintiff is entitled to interest on his attorney's fees.

II. THE PLAINTIFF'S INTEREST ON ATTORNEY'S FEES SHALL BE CALCULATED BASED ON THE UNITED STATES TREASURY BILL RATE BECAUSE OF THE SUBSTANTIAL CASE LAW THAT APPLIES SECTION 1961(a) TO JUDGMENTS AWARDING ATTORNEY'S FEES.

[5] Since the Court has found that the Plaintiff is entitled to interest on attorney's fees, the Court must now decide the appropriate interest rate. According to the Plaintiff, the calculation should be based on the prime rate of interest for

each year they were entitled to fees. (Pl's. Mot. for Interest on Attorney's fees at 9.) In his argument, Plaintiff cites to several cases that apply the prime rate of interest. Id. (citing e.g., Alberti v. Klevenhagen, 896 F.2d 927, 938 (5th Cir.1990) (prime rate of interest is applied to compensate counsel for delay in payment).

However, the fatal flaw in Plaintiff's argument is that those decisions used the prime rate when the payment of attorney's fees--not interest--has been delayed. In contrast, the Plaintiff, here, has already received attorney's fees. At issue is only the payment of interest.

In calculating the interest due the Plaintiff, the Court is, instead, persuaded that the statute providing for payment of interest on a judgment shall apply. The statute, 28 U.S.C. s 1961(a), calculates interest due upon a judgment based upon the United States Treasury Bill rate. The statute provides:

Interest shall be allowed on any money judgment in a civil case recovered in a district court.... Such interest shall be calculated ... at a rate equal to the coupon yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment.

28 U.S.C. s 1961(a) ("Section 1961"). Since it is well-settled that Section 1961 is used to calculate the interest due on a

judgment awarding attorney's fees, see e.g., MidAmerica Fed. Savs. & Loan Ass'n v. Shearson/Am. Express, Inc., 962 F.2d 1470, 1475-77 (10th Cir.1992); cf.

Oklahoma Aerotronics, Inc. v. United States, 943 F.2d 1344, 1349 (D.C.Cir.1991), the Court shall apply the United States Treasury Bill rate of interest in determining the amount of interest due the Plaintiff.

In response to the Court's request, the Defendant computed the interest that would be due the Plaintiff for the period ending November 21, 1991 in accordance with 28 U.S.C. s 1961(a). According to those calculations, the total amount of interest due is $21,952.68. The portion due Reed, Smith is $13,468.94 and the portion due the Lawyers' Committee is $8,483.74.

Therefore, based on the Defendant's calculations, the Court shall award plaintiff interest on his attorney's fees in the amount of $21,952.68.

CONCLUSION

For the foregoing reasons the Court shall award the Plaintiff interest on his attorney's fees based on the United States Treasury Bill rate of interest. The Court shall enter an Order of even date herewith.

END OF DOCUMENT

Supreme Court, U.S.
FILED
95-88 FEB 21 1995

Case No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JESSE A. EDWARDS, Pro Se

Petitioner,

V.

BRUCE BABBITT, SECRETARY,
UNITED STATES DEPARTMENT
OF THE INTERIOR
Minerals Management Service

Respondent.

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-c-2444

JESSE A. EDWARDS

Plaintiff,

v.

DONALD P. HODEL, et al,

Defendants,

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

CARRIGAN, J.

This action was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, as amended, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 623(a) and (d). Plaintiff, Jesse A. Edwards, claims that the defendant, United States Department of Interior, Minerals Management Service, failed to promote him: (1) because he is Black; (2) because he is over forty (40)

years old; and (3) in retaliation for protected EEO activity. MMS is an employer within the meaning of 42 U.S.C. 2000e(b).

1. GENERAL BACKGROUND.

Federally owned oil and gas exploration rights are leased to private persons by the Department of the Interior. The Royalty Management Program, located in Lakewood, Colorado, handles accounting for the lease payments. The Lakewood office currently employs over 500 people. Prior to October 1982, this operation was part of the United States Geological Survey ("USGS"). During 1981, it became known that a new agency, Minerals Management Service ("MMS") would be created, and that a massive reorganization would be undertaken, creating hundreds of new jobs. The process used to fill these and subsequent vacancies is the subject of this litigation.

Plaintiff, a Black Male, began his employment in USGS's Los Angeles office in May 1976 as an accountant, grade GS-9. Subsequently, he was promoted to accountant, grade GS-11. In September 1979, he was promoted to Supervisory Accountant, GS-12. In January 1982, he transferred to the Lakewood, Colorado, Royalty Management Program. His position became part of MMS at it inception on October 2, 1982.

During 1981, 1982 and 1983, the plaintiff applied for numerous GS-12, GS-13 and GS-14 positions in MMS and its

predecessor units. He was rejected for promotion to any GS-13 or GS-14 position, and filed complaints of discrimination with reference to the failure to promote. These complaints eventually formed five agency cases, with five corresponding EEOC case numbers, X059, X073, X074, X075 and X052[1]. Eventually, the first four cases were consolidated for hearing before the EEOC and for final decision. The fifth, X052, was subject to a separate hearing and final agency decision, as well as later orders from the EEOC

II. THE COMPONENT EEOC CASES

While it is unnecessary to detail the facts of all the component cases, a brief discussion is warranted. EEOC case number X059 involved eleven vacancy announcements. However, only one, 81-226, involved a promotion to Grade 13, and a career ladder to Grade 14.[2] Therefore, I will limit my discussion of case number X059 to vacancy announcement 81-226.

Plaintiff applied for a Supervisory Accountant GS-13/14 position in summer of

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[1] Summary of Plaintiff's Complaints

EEOC#	Position(s)	Date of Application	
X059	Supervisory Acct.	Grade 13/14	Summer '81
	Supervisory Acct.	Grade 12/13	Summer '81
X073	Supervisory Acct.	Grade 13	3/26/82
X074	Auditor	Grade 13	9/82
X-75	Supervisory Acct.	Grade 13	9/82
X052	Supervisory Acct.	Grade 13	8/83
	Supervisory Production Analyst	Grade 13	
	Production Manager	Grade 13	

[2] "Career ladder positions" designated by two grades (i.e. GS-13/14), provide the selectee a promotion to the higher grade after one year, assuming satisfactory performance

1981. It is undisputed that he was qualified for this position. The selectee was William Trujillo. While the plaintiff's educational background is and then was superior to Trujillo's [3], the work experience of both candidates was then comparable. However, a significant part of Trujillo's experience was gained via a "detail" to the Royalty Management Working Group ("Working Group"). A detail is a temporary assignment of an employee to another position. Ron Jones the *de facto* selecting official for vacancy announcement 81-226, indicated that Trujillo's detail experience was a substantial factor in the selection of Trujillo over the plaintiff. But for Trujillo's detail to the working group plaintiff's education and work experience would have been superior to Trujillo's.

Details are a legitimate method of temporarily reassigning an employee to a different job. However, if the detail is used to circumvent the competitive selection process (discussed *infra*), it is improper. This is true regardless of its availability to one class of employees, or all employees.

Unfortunately, it appears that, at the time in question, details in MMS were only being made available to non-Black employees. This fact exacerbated the discrimination problem, eliminating any chance of advancement by Blacks through

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[3] Plaintiff has a Bachelor of Science degree from the University of Southern California, (major in accounting), and a Masters in Business Administration from Pepperdine University (major in management). Mr. Trujillo does not have any advance degree.

this channel, and undermining the agency's affirmative action programs. I conclude that the detail of Trujillo, because it was an employment advantage made available only to non-Black employees, was improperly used to pre-select a non-Black candidate for the vacant position in question.

Given this improper employment of the detailing procedure, and the fact that this detail was not available to Blacks, I conclude that the experience gained by Trujillo through his detail should not have been considered when evaluating the relative credentials of the plaintiff and Trujillo. When Trujillo's detail experience is discounted, there is no question that the plaintiff's education and work experience, in both public and private sectors, was superior. Thus he should have been chosen as the candidate most qualified to fill the vacancy.

EEOC case numbers X073, X074, and X075 have similar facts. The eventual selectee for each of these positions was, previous to selection, either detailed to the vacant position, temporarily assigned to the position, or given additional responsibilities which encompassed those of the new position. Selecting officials consistently cited experience thus acquired as an important factor in choosing the successful applicant. It is apparent in these instances that details were improperly employed to preselect appointees for vacant positions, and I so conclude.

EEOC case number X073 has one

distinguishing factor. In August 1981, vacancy announcement CR-180 was published, and a best qualified list was created (see procedure below). Plaintiff was on the best qualified list, but Michael Miller (the eventual selectee) was not. The vacancy announcement was then withdrawn. The stated reason for its withdrawal was a temporary hiring freeze. However, during this time, other MMS positions were filled.

After withdrawal of the vacancy announcement, Miller was detailed into the position. Mine months later, vacancy nnouncement CR-88 was issued for the identical position. Miller made the best qualified list, and was selected. Again, the experience Miller had gained during the detail was the deciding factor. Miller was not Black.

III. THE COMPETITIVE SELECTION PROCESS

MMS and its predecessor, USGS, had established procedures to fill job vacancies. A supervisor who had a vacancy informed the personnel department. Personnel issued a "Vacancy Announcement." and interested parties submitted applications. Personnel then screened the applications to determine which applicants met the vacancy minimum requirements. Minimally qualified applicants were submitted to a "Rating and Ranking Panel,"[4]

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[4] Rating and Ranking panels are made up of MMS employees who are in positions rated at least as high as the position to be filled. If an applicant is applying for a lateral transfer (no increase in grade), his application does not go the rating and ranking panel. Instead, it is automatically makes the best qualified list.

that used a point system to evaluate each applicant. The rating and ranking panel then compiled a list of the best qualified applicants ("Best Qualified List"). That list was then alphabetized and sent to the supervisor ("Selecting Official"). The selecting official conducted interviews and made a selection. When making a selection, the selecting official was allowed to consider only an applicant's knowledge, ability, skills and other credentials.[5]

The improper use of details unfairly undermined this process. MMS has admitted that "the deciding factor of selection tends to be the detail experience afforded the selectee." "Proposed Agency Disposition, March 12, 1984 (Plaintiff's exhibit 1-D page 8). The cited exhibit concludes that:

> "the policy (use of details) as is tended to act as a barrier against this employee (plaintiff) regarding assignment to PAAS. Further this policy excludes by allowing the details to PAAS to be primarily non-minorities. Hispanics, another protected class appears to be afforded the opportunity -- not true of the complainant's protected class (Blacks)."

Thus it seems clear that the agency was aware that details were employed in a manner that unfairly discriminated against qualified Blacks.

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[5] These criteria are commonly referred by the acronym KASOC.

IV. RELIEF PREVIOUSLY GRANTED

The EEOC Complaints Examiner, Juan Vigil, concluded that the plaintiff had been the victim of discrimination in four cases. As a result, Vigil recommended that the plaintiff be promoted to a GS-13 position retroactive to June 1981, and to a GS-14 position retroactive to June 1982.

MMS accepted part of the EEOC's recommended findings[6] and provided the plaintiff some of the recommended relief. On November 27, 1985, the plaintiff was promoted to a GS-510-13 Supervisory Accountant position, retroactive to June 13, 1982. In connection with the plaintiff's final EEOC claim (X052), on February 24, 1989, the plaintiff was given a lateral transfer to a GM-301-13 Supervisory Production Analyst position. Since this position did not involve a pay raise, no retroactive action was necessary.

In light of the relief previously granted, I conclude that only the following issues remain unresolved:

(1) Did the selection of Trujillo for vacancy announcement 81-226 violate the plaintiff's rights protected by Title VII?

(2) If the defendant violated the plaintiff's rights protected by Title VII, should the plaintiff be

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[6] MMS admitted discrimination and retaliation in two of the four consolidated EEOC cases (X073 and X075).

retroactively promoted to a GS-13 position as of June 1981, and a GS-14 position as of June 1982?

(3) Should the plaintiff be promoted to a GS-15 position, and if so, as of what date?

(4) Should MMS be ordered to modify its affirmative action program?

V. TITLE VII

A. Race Discrimination.

Cooper v. Federal Reserve Bank of Richmond, 467, U. S. 867 (1984) contains an excellent review of the method used by the Supreme Court to evaluate a Title VII case.

> "A plaintiff bringing a civil action for a violation of . . . Title VII . . . has the initial burden of establishing a *prima facie* case that his employer discriminated against him on account of race, color, religion, sex or national origin. A plaintiff meets this initial burden by offering evidence adequate to create an inference that he was denied an employment opportunity on the basis of a discriminatory criterion enumerated in Title VII. A plaintiff alleging one instance of discrimination established a *prima facie* case justifying an inference of individual racial discrimination by showing that he (1) belongs to a racial minority, (2) applied and was qualified for a vacant

> position the employer was attempting to fill, (3) was rejected for the position, and (4) after his rejection, the position remained open and the employer continued to seek applicants of the plaintiff's qualifications. (Citation omitted) Once these facts are established, the employer must produce 'evidence that the plaintiff was rejected, or someone else preferred, for a legitimate, nondiscriminatory reason.' (Citation omitted) At that point, the presumption of discrimination drops from the case and the district court is in a position to decide the ultimate question in the suit: Whether the particular employment decision at issue was made on the basis of race."

Cooper, at 874 - 875 [citing *McDonnell Douglas Corp. v.Green*, 411 U.S. 792 (1973), and *Texas dep't of Community Affairs v. Burdine*, 450 U.S. 248,253 (1981)]

It is undisputed: (1) that the plaintiff belongs to a racial minority; (2) that he applied and was qualified for, (he made the best qualified list) a vacant position that MMS was trying to fill (vacancy announcement 81-226; (3) that he was rejected; and (4) after his rejection, MMS continued to seek applicants of his qualifications or less (Trujillo). Therefore, the plaintiff has established a *prima facie* case of discrimination, and the defendant has the burden to articulate non-discriminatory business reasons for preferring Trujillo over the plaintiff. Cooper at 875.

Far from articulating any non-discriminatory reason for preferring Trujillo, the evidence indicates that the defendant relied on improper reasons. Ron Johnson, the selecting official, admitted that Trujillo's detail to the working group was a significant factor in his selection. In its proposed disposition, MMS stated that experience gained in details tended to be the "deciding factor" in making decisions. I have already concluded that Blacks were improperly excluded from details, and that experience gained through discriminatory detailing should not have been considered when comparing the plaintiff and Trujillo. Therefore, I conclude that the defendant has failed to articulate a non-discriminatory reason for preferring Trujillo over plaintiff.

Under McDonnell Douglas and Burdine standard, the plaintiff has established a *prima facie* case of discrimination. Defendant has not articulated a non-discriminatory reason for preferring Trujillo. Therefore, I conclude that the plaintiff must prevail on his Title VII claim as to vacancy announcement 81-226.

B. Retaliation

I have already concluded that the defendant discriminated against plaintiff on the basis of race, in violation of Title VII, regarding vacancy announcement 81-226. This position, a Grade GS-13/14 is the first that the plaintiff claims he was illegally denied. Therefore, there is no possibility of retaliation in relation to this position. Even if I conclude that

the defendant denied the plaintiff a later position in retaliation for his protected EEO activity, no additional relief would be available. Therefore, the plaintiff's retaliation claim is moot.

VI. AGE DISCRIMINATION - ADEA

The elements of a *prime facie* case of age discrimination are identical to those for race discrimination under Title VII. *Hall v. American Bakeries Co.*, 873 F.2d 1133, 1134 (8th cir. 1989). It undisputed that the plaintiff was over forty years old at all revelant times. I have already concluded that the plaintiff applied for a position for which he was qualified, and that he was not promoted to that position. This leaves the final element, that the defendant promoted an individual not in the plaintiff's protected class. I conclude that the plaintiff failed to present sufficient evidence to carry his burden of proof as to this element, and therefore he has failed to establish his *prima facie* case of age discrimination. Therefore, on the plaintiff's ADEA claim, I find for the defendant.

VII. PLAINTIFF'S REMEDY.

Plaintiff has asked this court, *inter alia*, to promote him retroactively to a GS-13 as of June 1981, to a GS-14 as of June 1982, and to a GS-15 as of some time thereafter. I will address each requested promotion individually.

A. Promotion to Grades 13 & 14.

Plaintiff was denied promotion to

Supervisory Accountant, Grade 13/14 in June 1981 in violation of 42 U.S.C. § 2000e et seq. Once a court find unlawful discrimination, 42 U.S.C. § 2000e-5(g) empowers it to order any appropriate remedy. Plaintiff seeks retroactive promotion to grade 13, effective June 1981, and to grade 14 effective June 1982, including back pay and other benefits. I conclude that those promotions would be appropriate to make plaintiff whole and that he is entitled to them.

B. Job Skipping

Citing *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), the plaintiff argues that the court should place him in a higher position (GS-15) than that to which he would have been promoted in 1981 had the defendant not discriminated against him.

In *Pecker*, the position that the plaintiff applied for was upgraded during pendency of the case. It is true that the court ordered that she be put in a position one grade higher than the one for which she had applied. But it was in fact the same job. This situation is much closer to the "career ladder" positions discussed earlier. The instant plaintiff applied for a grade 13/14 position. There is no dispute that if he had been placed into that position, he would have been elevated to a grade 14 after a sufficient time in grade 13, absent circumstances not here present.

The other cases cited by the plaintiff indicate that job skipping is

appropriate where an employer has discriminatorilly excluded some employees from whole lines of progression within the employer's workforce. See *locke v. Kansas City Power & Light Co.*, 660 F.2d 359, 368-369 (8th Cir. 1981); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir.) *cert. denied*, 429 U.S. 861 (1976). There is no evidence in this case that the plaintiff was excluded from the entire line of progression to the grade 15 level. To the contrary, the plaintiff has held several positions that are prerequisites for the positions he now seeks. I decline to extend the job skipping concept to situations beyond those where it has traditionally been applied. Therefore, the plaintiff is not entitled to a grade 15 position.

C. Other Declaratory and Inductive Relief.

Plaintiff seeks declaratory and injunctive Relief regarding MMS's affirmative action program. By agreement of the parties, that issue has been bifurcated from the rest of the case. Therefore, it is not necessary for me to rule on it at this time.

IX. ORDER

IT IS ORDERED THAT:

(1) Plaintiff shall be retroactively promoted to grade GS-13 including back pay and other benefits, as of the same day Trujillo assumed the position described in vacancy announcement 81-226;

(2) Plaintiff shall be retroactively promoted to grade GS-14, including back pay and other benefits, effective one year after his promotion to GS-13;

(3) The parties and their counsel shall meet and confer within thirty days of this order to calculate the amount owed to plaintiff in back pay and other benefits. Further, the parties are ordered to report the results of this meeting to this court in writing within eleven days after their meeting; and

(4) The parties and their counsel shall meet and confer within (30) days of this order in good faith attempt to reach a stipulation that would eliminate the need for any further hearing on the proposed injunctive or declarative relief. Further the parties are ordered to report the results of this meeting to this court in writing within eleven days after their meeting. If the parties conclude that a remedies hearing is necessary, then each party shall submit briefs, proposed findings of fact, proposed conclusions or law, and a proposed order within eleven (11) days after their meeting. Either part , or both, may apply for an expedited hearing on any further remedies sought.

Dated at Denver, Colorado May 29, 1990.

BY THE COURT:

_____
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 4 1995
OFFICE OF THE CLERK

No. 95-88

In the Supreme Court of the United States

OCTOBER TERM, 1995

JESSE A. EDWARDS, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 114 of the Civil Rights Act of 1991, 42 U.S.C. 2000e-16 (Supp. V 1993), which authorizes interest awards against the federal government in Title VII actions, should be applied retroactively to award prejudgment interest on petitioner's back pay award which was entered before the effective date of the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-88

JESSE A. EDWARDS, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 40 F.3d 1152. The district court's opinion on liability (Pet. Supp. App. 1-16) is reported at 738 F. Supp. 426, but its order concerning remedies (App., *infra*, 1a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1994. The petition for a writ of certiorari was filed on February 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an employee of respondent United States Department of the Interior since 1976, filed suit in the United States District Court for the District of Colorado, alleging that respondent discriminated against him on the basis of race and age by failing to promote him and by retaliating against him, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. 623(a) and (d) (ADEA). Pet. Supp. App. 1-2. Following a trial, the district court rejected petitioner's ADEA and retaliation claims, *id.* at 11-12, but found that respondent had discriminated unlawfully against petitioner on the basis of race, *id.* at 9-11.

In its May 29, 1990, order entering judgment for petitioner under Title VII, the district court ordered that petitioner be given a retroactive promotion with back pay and other benefits. Pet. Supp. App. 14-15. The court directed the parties to submit additional information to the court concerning the amount due petitioner and any further remedies. *Ibid.* After a hearing on the remaining remedial issues, the court issued a final order on remedies on May 9, 1991. App., *infra*, 1a-11a. In that order, the court incorporated the parties' consent decree, ordered back pay and attorney's fees with post-judgment interest, and awarded petitioner other equitable relief. The court denied petitioner's request for prejudgment interest. *Ibid.*

Neither party appealed from the district court's liability determination, but both parties appealed from the court's remedial order. Petitioner sought review of the district court's failure to award prejudgment

interest and its failure to order that a particular job vacancy be reopened. Respondent sought review of the awards of post-judgment interest. Gov't C.A. Br. 6.

2. On November 21, 1991, while the case was pending before the court of appeals, the Civil Rights Act of 1991 went into effect. Pub. L. No. 102-166, 105 Stat. 1071. Section 114 of the Act authorizes interest awards against the United States under Title VII. 105 Stat. 1079 (codified at 42 U.S.C. 2000e-16(d) (Supp. V 1993). Section 114 provides that in Title VII cases against the United States, "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." *Ibid.* The Act thereby changed the rule announced in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), to the extent the Court had held that in a Title VII suit against a federal defendant, the plaintiff could not recover interest on the attorney's fees awarded by the court.

3. The court of appeals modified the judgment and affirmed. Pet. App. 1-8. The court rejected petitioner's argument that the district court erred in refusing to reopen a vacancy announcement, Pet. App. 7-8, and it ruled on three questions regarding awards of interest against the United States.

First, the court held that under *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986), petitioner was not entitled to interest on his attorney's fees award because the United States is immune from interest awards "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit." Pet. App. 4, quoting *Shaw*, 478 U.S. at 314. No such congressional waiver existed at the time judgment was

entered in this case. Pet. App. 4. The court noted, however, that Section 114 of the Civil Rights Act of 1991 subsequently amended Title VII to allow interest on awards against the government. Pet. App. 4 n.3.[1] The court concluded, however, that the rationale set forth in *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), and *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510 (1994), supporting the presumption against retroactive application of other provisions of the Civil Rights Act of 1991, supports a presumption against retroactive application of Section 114 as well. Pet. App. 4 n.3. The court therefore modified the judgment to vacate the award of interest on the attorney's fee award. *Id.* at 8.

Second, the court affirmed the district court's denial of prejudgment interest on petitioner's back pay award. Pet. App. 5-7. It rejected petitioner's argument that the Back Pay Act, 5 U.S.C. 5596, constituted a waiver of sovereign immunity for prejudgment interest on the Title VII back pay award in this case. Like the district court, the court of appeals adopted the reasoning of *Brown* v. *Secretary of Army*, 918 F.2d 214, 216 (1990), cert. denied, 502 U.S. 810 (1991), in which the District of Columbia Circuit held that the coverage of the Back Pay Act, as amended in 1978, is limited to back pay awards "stemming from the unlawful 'withdrawal or reduction' of compensation," including "illegal refusals to make mandatory promotions," but does not cover competitive or discretionary promotions. Pet. App. 6-

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[1] Due to an apparent typographical error, the footnote in the petition appendix is identified as footnote 3, whereas the footnote is identified as footnote 1 in the opinion as reported. See 40 F.3d 1152, 1154 n.1.

7. Because petitioner's case involved competitive and discretionary promotions, the court concluded that the case was not covered by the Back Pay Act and affirmed the denial of prejudgment interest on the back pay award. *Id.* at 7.

Finally, the court of appeals reversed the district court's award of post-judgment interest because it was not based on a congressional waiver of sovereign immunity. Pet. App. 7.

ARGUMENT

Petitioner contends (Pet. II) that the court of appeals' opinion conflicts with *Brown* v. *Marsh*, 868 F. Supp. 15 (1994), appeal pending, Nos. 95-5026, 95-5048 (D.C. Cir.) (Pet. App. 9-18), in which the District of Columbia District Court applied Section 114 of the Civil Rights Act of 1991 retroactively to award interest on attorney's fees in a Title VII case that was pending when Section 114 went into effect.[2] Petitioner asserts that if the government does not have immunity against payment of interest on attorney's fees, it does not have immunity against payment of interest on the back pay award at issue in this case. Pet. II.

In *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), the Court held that where a newly enacted statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct,

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[2] Petitioner relies solely on *Brown* v. *Marsh* and challenges neither the court of appeals' rejection of the Back Pay Act as a justification for a prejudgment interest award on his back pay nor the court's denial of post-judgment interest. Petitioner also does not raise any issue arising out of the denial of interest on his attorney's fees. See Pet. ii, I-II.

or impose new duties with respect to transactions already completed," it cannot be applied retroactively "absent clear congressional intent favoring such a result." 114 S. Ct. at 1505. The *Landgraf* Court therefore held that Section 102 of the Civil Rights Act of 1991, 105 Stat. 1072-1074, which authorized punitive damage awards against private defendants and compensatory damage awards against defendants generally in Title VII cases, should not be applied retroactively. The Court explained that Section 102 would

> undoubtedly impose on employers found liable a new disability in respect to past events. The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored.

114 S. Ct. at 1507 (internal quotation marks and citation omitted) (emphasis in original).

Prior to the enactment of Section 114, the federal government was immune from paying interest on Title VII awards for the type of discriminatory action involved here. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). By waiving sovereign immunity with respect to interest on such awards, Section 114 expanded the rights of prevailing plaintiffs in Title VII cases, thereby increasing the extent of the government's liability. The Fourth Circuit held in another recent back pay case that Section 114

> is subject to *Landgraf*'s rule of nonretroactivity: requiring the federal government to pay interest would disrupt the longstanding expectation created by the no-interest rule, and thus un-

> questionably would impose an important new legal burden on the federal government.

Woolf v. *Bowles*, 57 F.3d 407, 410 (1995). Thus, the Fourth Circuit has reached the same conclusion as the court of appeals below. *Ibid.*; see also *Huey* v. *Sullivan*, 971 F.2d 1362, 1365 (8th Cir. 1992) (pre-*Landgraf* ruling that Section 114 of 1991 Act does not apply retroactively to interest on back pay), cert. denied, 114 S. Ct. 1642 (1994); but see *Estate of Reynolds* v. *Martin*, 985 F.2d 470 (9th Cir. 1993) (pre-*Landgraf* decision based on reasoning expressly rejected in *Landgraf*). Petitioner does not allege any conflict among the courts of appeals on this matter after *Landgraf*.

The single district court case, *Brown* v. *Marsh*, on which petitioner relies is inconsistent with *Landgraf*.[3] In *Brown* v. *Marsh*, the district court held that Section 114 could be applied retroactively with respect to interest on attorney's fees because awarding interest on attorney's fees affects only "collateral" rights of the parties, not the parties' substantive rights. This Court has held, however, that interest on monetary awards against the United States is an additional element of damages traceable to the underlying unlawful conduct at issue. See *Shaw*, 478 U.S. at 314.

Petitioner seeks an award of interest on a back pay award rather than interest on attorney's fees. Under the *Brown* court's approach, interest on a back pay award would not be characterized as affecting only

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[3] The government's appeal in *Brown* is currently pending in the District of Columbia Circuit. D.C. Cir. Nos. 95-5026, 95-5048.

"collateral" rights of the parties because a back pay award is not "uniquely separable from the cause of action to be proved at trial," 868 F. Supp. at 18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1995

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 85-C-2444

JESSE E. EDWARDS, PLAINTIFF

v.

MANUEL C. LUJAN, JR., ET AL., DEFENDANTS

[Filed May 9, 1991]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CARRIGAN, J.

This action was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623(a) and (d). Plaintiff, Jesse A. Edwards, claimed that the defendant, United States Department of Interior, Minerals Management Service, failed to promote him: (1) because he is Black; (2) because he is over forty years old; and (3) in retaliation for protected

EEO activity. MMS is an employer within the meaning of 42 U.S.C. § 2000e(b).

The matter was tried to the court in April 1990, and on May 29, 1990, a judgment was entered for the plaintiff on his Title VII claim. In that order, the parties and their counsel were directed to meet and confer to calculate the amount of back pay and other benefits owed the plaintiff and to determine whether they could agree on any injunctive relief that might be appropriate. In the ensuing nine months, the parties were unable to agree on all issues. Therefore, on January 25 and 28, 1991, a remedies hearing was held to consider: (1) whether injunctive relief should be ordered; (2) whether the plaintiff should be given a new GM-14 position; (3) whether the plaintiff's back pay calculation should be determined based on a "fully satisfactory" performance rating or some other performance rating; (4) whether prejudgment interest should be awarded; (5) whether the defendant should be required to provide the plaintiff an individual development plan; (6) whether the defendant should be required to reopen Vacancy Announcement MMS-91-004; and (7) attorneys' fees.

I. *Injunctive Relief*.

During the hearing, the parties agreed on the appropriate injunctive relief, and that agreement was read into the record. The parties subsequently added to their agreement and on January 28, 1991, they submitted the final agreement as a consent decree. I incorporate that consent decree as part of this order.

One issue relating to injunctive relief remains unresolved: Whether the defendant should be

ordered to establish mandatory goals and timetables in its Affirmative Action plan. Most of the January 25, 1991, hearing was devoted to that issue. Both parties tried to establish, through statistical evidence, whether Black males are underrepresented at the GS-13, 14 and 15 grade levels at MMS.

Several credible witnesses testified that, at this time, the percentage of Black male accountants at MMS is approximately equal to the percentage of Black male accountants nationally. Plaintiff presented contrary evidence. It appears, however, that MMS has increased Black male representation in upper level accounting positions. Therefore, even if Black males are still underrepresented, MMS has made significant progress in this area. Thus, I find that the plaintiff has not shown that there is currently a pattern or practice of discrimination. Absent such a showing, the plaintiff is not entitled to the extraordinary relief provided by a permanent injunction and that relief is denied. *Drez v. E.R. Squibb & Sons, Inc.*, 674 F. Supp. 1432 (D. Kan. 1987).

II. *New GM-14 Position.*

As a result of my May 29, 1990 order, the plaintiff was retroactively promoted to GS-13, and then to a GM-14. Asserting that his new position is simply his old position with a new title and grade, the plaintiff now seeks a new GM-14 position.

In support of its contention that the plaintiff was given new responsibilities when he was promoted to GM-14, the defendant called Paul Macias, staff assistant to MMS's associate director. Macias developed the plaintiff's new job description and

testified that the plaintiff now has a much broader role in his area of expertise. In addition, Macias testified that it is not unusual for MMS to promote people "in place." I find that the plaintiff was given a retroactive promotion to a GM-14 position, and that position includes new responsibilities. That is all that my May 29, 1990 order required. Therefore, the plaintiff is not entitled to an order from this court requiring the agency to create the new position he now seeks.

III. *Plaintiff's Performance Ratings.*

Throughout the 1980's, the plaintiff was rated as "fully satisfactory." Plaintiff now seeks to have his back pay determined using a higher standard, namely "exceeds fully satisfactory." Plaintiff has not produced any evidence that his ratings were inaccurate, or that the ratings were motivated by anything other than fair evaluation of his performance. Absent credible evidence that his performance ratings were motivated by something other than his performance, I cannot order that those evaluations be changed. Therefore, the back pay calculation shall be made based on the ratings that the plaintiff received, "fully satisfactory."

IV. *Prejudgment Interest.*

Relying on the Back Pay Act (the Act), 5 U.S.C. § 5596, the plaintiff seeks prejudgment interest. Citing *Brown* v. *Secretary of Army*, 918 F.2d 214 (D.C. App. 1990), the defendant asserts that the United States has not waived its sovereign immunity in cases such as this. Although not controlling, *Brown* is directly on point and I therefore adopt its rationale.

In *Brown*, a Black civilian employed by the United States Army claimed that the Army, in violation of Title VII, denied him a promotion based on his race. The trial court ordered that the Army retroactively promote the plaintiff and awarded him back pay, but refused to grant him prejudgment interest.

On appeal, the *Brown* court held "that the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards . . . ." *Id.* at 218. That conclusion, however, does not lead inexorably to the result that the instant plaintiff is entitled to prejudgment interest. Before so concluding, I must determine whether the Act applies. The Act applies only if a federal employee has "been affected by an unjustified or unwarranted personnel action *which has resulted in the withdrawal or reduction of all or part of [his compensation]*." 5 U.S.C. § 5596(b)(1) (emphasis added).

After reviewing the Act's 1978 amendment, the regulations adopted to enforce it, and subsequent cases, the District of Columbia Circuit court concluded that:

> "the 1978 Back Pay Act definitional amendment mean[s] that if an upgrade is mandatory once specified conditions are met, the Act now affords a retrospective remedy. If an upgrade is not of that virtually automatic, noncompetitive kind, the Act affords no relief." *Id.* at 220.

Therefore, if the defendant improperly withheld an automatic upgrade, the plaintiff is entitled to prejudgment interest. If, however, the plaintiff was

improperly denied a competitive upgrade, prejudgment interest is inappropriate.

In his complaint, the plaintiff alleged that he had not been selected for competitively offered positions because (1) he is Black, and (2) to retaliate for his protected EEO activities. Plaintiff did not allege that he should have received these promotions automatically; rather he claimed that the selection process was not fair. I conclude that under *Brown*, the Act does not apply, and therefore the plaintiff is not entitled to prejudgment interest.

V. *Individual Development Plan.*

Plaintiff seeks an order requiring the defendant to prepare for him an individual development plan. He testified that each year he selects training courses that he feels would enable him to continue his professional development. Several credible witnesses testified on behalf of he defendant that, even without such an individual development plan, the plaintiff will receive the training he needs to perform his new job assignment and to continue his professional growth.

Obviously it is in the defendant's best interest to train the plaintiff adequately so that he can perform his job competently and efficiently. Moreover, the plaintiff did not present any evidence that he has not received adequate training in the past. In fact, on direct examination, the plaintiff indicated that recently he had asked permission to attend four courses. Although his request had not yet been granted, he believed that he would be allowed to attend at least some requested courses. Plaintiff has not asserted that other, non-minority employees were allowed to attend every course

requested. I conclude that the plaintiff has not presented sufficient evidence to justify invoking this court's equity powers, and therefore I must decline to order the defendant to provide him an individual development plan.

VI. *Vacancy Announcement MMS-91-004.*

Because the plaintiff was not retroactively promoted to grade 14 until December 30, 1990, he was unable to apply for two grade 15 positions offered in vacancy announcement MMS-91-004. As an additional remedy he asks that I order those positions reopened so that he can apply. Although it is true that the defendant took almost eight months after this court's order to promote the plaintiff to grade 14, there is no evidence suggesting that had he been promoted earlier, he would have secured either position offered. To the contrary, it seems unlikely that the plaintiff would have succeeded.

One criterion used by rating and ranking panels to select a candidate is his or her prior experience. Had the plaintiff been promoted to grade 14 immediately after this court entered judgment on May 29, 1990, he would have been in that job less than six months when the vacancy was announced. Moreover, the successful applicant for both positions must supervise auditors. Plaintiff has done no formal audit work since 1981, and has little if any current experience supervising auditors. Thus, I find and conclude that, the plaintiff would have been a weak candidate, at best, for the positions offered in vacancy announcement MMS-91-004. Therefore, I decline to order the defendant to reopen that vacancy announcement.

VII. *Attorneys' Fees.*

The parties agree that the plaintiff is entitled to attorneys' fees. Defendant asserts that because the plaintiff was represented by two attorneys, there was significant duplication of effort, and therefore the plaintiff's request, $81,716.76 for Mark Bove and $80,811.05 for Richard LaFond is excessive.

Participation in a case by more than one attorney does not always constitute unnecessary duplication of effort. *Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir. 1986). Indeed, the Government and its agencies are frequently represented in this court by more than one attorney and sometimes more than two. The same is true of private law firms that defend cases of this nature. This case was complicated, difficult and complex, and therefore I find and conclude that it was reasonable, if not imperative, that two attorneys represent the plaintiff.

In *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983), the Tenth Circuit has set out explicit guidelines for determining the appropriate amount of attorneys' fees. "The first step in calculating fee awards is to determine the number of hours reasonably spent by counsel for the party seeking fees." *Id.* at 553. Plaintiff's attorneys kept and have submitted meticulous, contemporaneous time records. The government has produced no evidence or argument to indicate these records are incorrect. After reviewing the records, I find and conclude that the time spent by the plaintiff's attorneys was reasonable.

Next, the court must set a rate of compensation. A private attorney's customary rate is a relevant, but not the conclusive factor. *Id.* at 555. "The hourly rate should be based on the lawyers' skill and experience in civil rights or analogous litigation. . . . The quality of the lawyer's performance in the case should also be considered in placing a value on his or her performance." *Id.* Moreover, "[t]he hourly rate at which compensation is awarded should reflect rates in effect at the time the fee is being established by the court," and should reflect the fee rates of the local area. *Id.*

I have already concluded that this was a complex case. The plaintiff's success evidences the skill with which his attorneys performed. The rate sought by the attorneys varies based on the service performed and the time at which that service took place. I find that the rates sought by the plaintiff's attorneys reflects fair and typical rates that prevailed in the Denver metropolitan area at the time the services were rendered. I therefore conclude that the rates sought are the appropriate rates at which to compensate the plaintiff's attorneys for the hours they spent on this case.[1]

In addition to fees for their own time, the plaintiff's attorneys seek reimbursement of other expenses and fees incurred in pursuing this action. "Items that are normally itemized and billed in

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[1] I note that under *Ramos*, the plaintiff's attorneys might have been entitled to seek the rate they *now* charge. Instead, they very reasonably seek only the rate in effect at the time the services were provided.

addition to the hourly rate should be included in fee allowances in civil rights cases if reasonable in amount." *Ramos*, 713 F.2d at 559. After examining the additional expenses and fees sought by the plaintiff's attorneys, I find and conclude that they are reasonable.

In summary, I conclude that the time spent by each of the plaintiff's attorneys on this case and the rates at which each seeks to be compensated are reasonable.

Accordingly IT IS ORDERED that:

(1) the consent decree filed January 28, 1991, is incorporated by reference and adopted as part of this order;

(2) the clerk shall enter a judgment for back pay in the amount of $68,968.00, plus interest from December 30, 1990;

(3) plaintiff is not entitled to and is not awarded prejudgment interest;

(4) within eleven days, the defendant shall pay Mark S. Bove $81,716.76 in attorneys fees and related expenses, plus interest at the lawful rate from the date of judgment;

(5) within eleven days, the defendant shall pay Richard C. LaFond $80,811.05 in attorneys' fees and related expenses, plus interest at the lawful rate from the date of the judgment; and

(6) Costs of the action are awarded in favor of the prevailing plaintiff and against the defendant.

Dated at Denver, Colorado May 9, 1991.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE